UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

RHINO NORTHWEST, LLC	Cases 19-CA-165356 19-CA-168813 19-CA-169067
And	19-CA-181097
LOCAL NO. 15, INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES AND MOVING PICTURE TECHNICIANS, ARTISTS, AND ALLIED CRAFTS OF THE UNITED STATES, ITS TERRITORIES AND CANADA, AFL-CIO, CLC	

CHARGING PARTY'S BRIEF IN SUPPORT OF CROSS-EXCEPTIONS

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I. INTRODUCTION

This case arises from the Charging Party's successful union organizing drive in 2015 and the Respondent's no-holds-barred attempt to rid itself the involved employees, especially three employees at the helm of the drive who engaged in the most visible protected concerted activity. The Respondent has excepted to numerous factual findings and legal conclusions made by Administrative Law Judge ("ALJ") John Giannopoulos in his November 3, 2017 decision ("the ALJD") in which he found that the Respondent violated Sections 8(a)(5), 8(a)(4), 8(a)(3), and 8(a)(1) of the Act by enacting unilateral changes to its employee "deactivation" practices, by discriminating against rigger employee Heidi Gonzalez for her protected concerted activity, union activity, and testimony at an NLRB hearing, and by discriminating against rigger Travis Rzeplinski for his protected concerted activity and union activity. Though the Charging Party concurs with the overwhelming majority of the ALJD findings, the Charging Party cross-excepts to certain conclusions and legal analysis underlying the ALJD's recommended dismissal of an additional set of charges brought by the Charging Party and General Counsel.[1]

For the reasons that follow, the Board should uphold the bulk of the ALJD but find that the ALJ erred in failing to consider evidence and apply Board precedent when applying the *Wright Line* test to the Respondent's deactivation of rigger Matthew Klemisch. *Wright Line, Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982), *approved in, NLRB v. Transport Mgmt. Corp.*, 462 U.S. 393 (1983). The Board should, thus, grant the Charging Party's cross-exceptions and conclude that a preponderance of the evidence supports the finding that the Respondent violated Sections 8(a)(3), 8(a)(4), and

[1] The Charging Party also concurs in the General Counsel's well-grounded analysis and refutation of the Respondent's exceptions, as detailed in the General Counsel's Answering Brief. Particularly, the Charging Party agrees with the General Counsel that the Respondent has presented with "many last ditch efforts to avoid its obligations by latching on to recent Board law or the change in General Counsel positions," without regard for the record at hand and the weight of applicable precedent. GC Answering Brief at 5.

8(a)(1) by deactivating rigger Matthew Klemisch for his protected concerted activity and testimony in an NLRB proceeding.

II. STATEMENT OF THE CASE

A. Respondent Operates A Production Labor Company For Entertainment Events Across The Northwest.

Rhino Northwest, LLC, is an event production company based in Fife, Washington. Tr. 458:12-13, 463:19-21.[2] The company is managed by President and CEO Jeffery Giek. Tr. 458:9-10, 466:23-25. Rhino Northwest, LLC, is one of many regional subsidiaries of national parent corporation Rhino Staging and Event Productions, Inc. RX 21, 22; Tr. 459:12-21.

Rhino provides labor for various local live entertainment event productions, including staff such as stagehands and riggers. Tr. 18:18-19, 460:6-8. Riggers are employees who suspend, either permanently or temporarily, theatrical and stage equipment above the heads of performers and/or audiences from safe points in ceilings, overhead structures, walls, or the ground, using winches, cables, ropes, pulleys, and other means that can lift and hold things in the air. Tr. 20:1-7. Rhino's riggers are separately supervised from stagehands. GCX 27.

Rhino has local Human Resources, dispatch, and managerial staff located in its Fife, Washington, office, including a local Director of Operations. GCX 27; Tr. 351:23-352:1. The Director of Operations, in turn, reports to the Regional Director of Operations in Nevada, and President and CEO Giek in California. GCX 27, 28; Tr. 394:20-21, 463:12-14.

Work on the production side of Rhino's business is intermittent. Employees maintain no fixed schedules and are, instead, offered work on upcoming productions as it becomes available. Tr. 63:12-19, 163:2-8, 209:10-20. The employer typically reaches out to employees to assess

[2] The Charging Party will provide transcript citations in the following format: "Tr. [page number]:[line number]." Hearing exhibits will be cited as follows: General Counsel's Exhibit ("GCX"), Respondent's Exhibit ("RX"), Union's Exhibit ("UX"), and Administrative Law Judge's Exhibit ("ALJX").

their availability for and interest in work on a given show, and employees' acceptance or rejection of the work available.[3] *Id.* Though occasionally riggers were scheduled for work several months before an event, most frequently, riggers received calls asking them to work for Rhino two to three weeks in advance of a show. Tr. 64:14-65:6. Occasionally, last-minute changes to the demands of a show also warranted last-minute work offers. Tr. 65:7-18, 212:8-12.

It is undisputed that, despite the Respondent's written conflict of interest policy prohibiting "acting as… employee… for any business with which the Company has a competitive or significant business relationship" without the written approval of President and CEO Giek (*see,* RX 1 at 37), nearly all of the riggers employed by Rhino perform work for multiple employers in the industry simultaneously, as no one company providing rigging labor does enough business to provide a rigger full-time employment. Tr. 59:13-25, 161:11-162:23, 209:5-6; Tr. 357:23-24. This was known and condoned. Tr. 467:13-19 (Giek acknowledgment). In fact, the Respondent never enforced its conflict of interest policy before the events involved in this case. Tr. 467:9-12.

B. Rigger Matthew Klemisch Was A Long-Time, Highly-Skilled Employee Of Respondent.

Matthew Klemisch is a highly-skilled, ETCP-certified rigger who has worked in the event production industry since 1997 or 1998. Tr. 54:7; Tr. 58:2-3. He was employed by Respondent from 2006 to 2015. Tr. 59:7-12. While employed by Rhino, Klemisch performed work for ten to fifteen other employers to make his living. Tr. 59:16-25. Rhino management was on notice of this. Tr. 60:11-61:8. In 2012, while working for Rhino, Klemisch also started

[3] Though typically scheduled in the manner described above, Rhino employees could also log into a password-protected web portal maintained by the company to view a calendar of upcoming shows and review their personal schedules. Tr. 85:2-8.

a company to focus on pre-production rigging services, a more specialized industry service than Respondent's focus, along with renting production equipment. Tr. 87:3-8; Tr. 344:2-16. Klemisch was open about his work for Precision, and numerous sources of evidence show that Respondent was on notice of Klemisch's Precision's operations well before 2015. Tr. 344:2-16 (Rigging Manager Tyler Alexander aware from time Klemisch started business); Tr. 87:20-90:3 (Precision Rigging and Respondent, including supervisor Eric Drda, worked together on same jobs); GCX 25 at 1 (Respondent's Director of Operations referred Precision Rigging for work).

C. Respondent's Riggers Filed A Petition For Union Representation In May 2015, And Riggers Including Matthew Klemisch Testified For The Union In An RC Hearing And Openly Assisted The Union Organizing Effort.

On May 26, 2015, the Union filed a petition seeking to represent a bargaining unit comprising exclusively Rhino's full-time and regular part-time riggers. Tr. 74:12-22. Rigger Matthew Klemisch took a leadership role in the Union's organizing drive. Before filing, Rhino riggers including Klemisch helped collect union authorization cards. Tr. 66:19-22. Additionally, Klemisch became a member of the riggers' organizing committee and the administrator of a "secret" Facebook group called Northwest Riggers, established for the purpose of answering riggers' questions about joining the Union and to discuss related topics. Tr. 66:20-67:8. Klemisch was open about his involvement in the union drive. Tr. 74:20-75:3; *see also*, UX2 (employee passing information to Giek citing Klemisch's leadership and stating that, if Klemisch were to sit at bargaining table for union, "it is not good for you").

On June 4-5, 2015, a pre-election representation hearing was held before an NLRB Region 19 Hearing Officer. GCX 36 (hearing transcript for June 4-5 RC hearing in *Rhino Northwest and Int'l Alliance of Theatrical Stage Employees*, 19-RC-152947). The key disputed issue at the hearing was whether a bargaining unit exclusively comprising Rhino's riggers was an appropriate unit under the Act. GCX 26 at Tr. 13:13-22. Riggers including Matthew Klemisch

and Heidi Gonzalez testified during Local 15's case about the professional craft of rigging and the skill gaps and working conditions that distinguished Rhino's riggers from its general stagehand pool. *Id.* at Tr. 220:12-222:19, Tr. 453:454:16.

With no prior lead-in, at one point during the hearing (and with no obvious relevance to the proceeding's merits), counsel for Respondent posed the following series of questions to Klemisch regarding Precision Rigging:

> Q: Do you have your own company?
> A: Yes.
> Q: Your own rigging company.
> A: Yes.
> Q: How many employees do you have?
> A: Part time or full time?
> Q: How many employees do you employ?
> A: On payroll, last year I think we had 30.
> Q: Thirty?
> A: I think so…
> Q: Do you work for your own company?
> A: Yes.
> Q: What jobs do you perform? Is it called Precision Rigging?
> A: Yes.

GCX 26 at Tr. 293:13-294:3. Klemisch admitted that the business competes with Respondent "on a small scale" but has a more specialized focus. GCX 26 at Tr. 293:17-21.[4] Rhino owner and CEO Giek was present throughout the testimony. Tr. 166:15-18.

Respondent's management ran a vigorous anti-union campaign. Shortly after the NLRB hearing, the Respondent announced a series of mandatory captive audience meetings. Tr. 77:13-20, 167:20-168:8, 216:7-12. At the meetings, Giek urged against unionizing and specifically singled Klemisch out for negative attention. GCX 17 (Rzeplinski recounting that

[4] Klemisch clarified elsewhere in his June 4 testimony that Precision "a couple times a year, ten times a year, [will] provide… rigging labor for shows" but that, more typically, he is hired, through Precision, "as a supervisor to supervise other people." GCX 26 at Tr. 295:13-15. This is consistent with a review of Precision's invoices from 2014-2015, which demonstrate that less than one-third of all events billed by Precision during that period reflected labor costs for more than one rigger (i.e., for more than just Klemisch's services). RX 4.

Giek "singled Matt [Klemisch] out," characterized him as the main driving force behind the union organizing movement, and referred to Klemisch as "an employee… meddling [in] business that he shouldn't"); Tr. 170:7-17, 195:18-195:13 (Gonzalez corroborating Giek statements that "That an employee was meddling [in] business that he shouldn't and he should butt out… [and] [t]hat he's trying to help his own company and that his company's not even union;" further identifying Klemisch by indicating that he was referring to someone who testified at the NLRB hearing).

Giek made numerous other contemporaneous negative statements about the Union. Tr. 217-218 (Union was "going to come and take our jobs, that why should [Rhino employees] stand in line for a job that [they] already had, that [the Union was] bad, that they could force Rhino out of… business, that it was unfair, and that it was [Respondent's] property"); GCX 17 at 3-4 (saying of Union, "they want to destroy Rhino"). Giek also derided riggers' testimony at the NLRB hearing, characterizing the testimony as negative "about the rest of the Rhino organization" and about how riggers "were different" from other Rhino employees. Tr. 217:23-218:21.

In a series of emails after the captive audience meetings, Giek continued to criticize Klemisch and the other RC hearing witnesses' testimony:

> If you were at the NLRB hearing, you would have heard three riggers testify, under oath, that they DO NOT work as a team with the stagehands. I was stunned by their denunciation of Rhino's core values. If those three riggers represent the values of IATSE, Rhino's dedicated employees have no need for the union.

GCX 17 at 2 (emphasis in original).[5] He reiterated the theme of Rhino workers collaborating across job classifications as a team and alluded to forces that were trying to divide the "team."

[5] The testimony must have "stunned" Giek, as he continued to criticize it for up to a year later. *See, e.g.*, GCX 32 at 1-2 (Giek reiterating in a May 18, 2016 email to those riggers still employed by Rhino: "During the hearing at the NLRB office in Seattle… IATSE made numerous derogatory comments about stagehands and distanced themselves

See, e.g., GCX 13 at 1-2 (June 29, 2015, email stating: "**We watch out for each other – we work together – we are a team.** Do you want to be part of a group that says, 'that's not my job' or 'that's not my problem?'… Just look at the conflict the union supporters have already created between the riggers and stagehands.") (emphasis in original); GCX 10 (June 19, 2015, email stating: "Working together as a team is vital to our future. I'm certain we will get through this difficult time and be a stronger team."); GCX 12 (June 27, 2015, email: "A 'No' vote is a vote for Rhino…").

Despite Giek's campaign, the Union prevailed in the riggers' representation election, the ballots for which were tallied on July 17, 2015. *See, Rhino Northwest, LLC*, 363 NLRB No. 72, slip op. at 1 (2015).

D. Respondent Ceased Offering Klemisch Work And Told Him In November 2015 That He Had Been Deactivated For Lack Of Work.

Over the summer and, particularly, following the Union's election victory, Klemisch and the other alleged discriminatees in this case, Heidi Gonzalez and Travis Rzeplinski, began noticing changes in Rhino's patterns of offering them work. Klemisch's scheduled work on two late July 2015 shows—a Mötley Crüe concert on July 24 and an Imagine Dragons concert on July 31—was cancelled. Tr. 78:22-79:2; *see also*, GCX 18 at 8. Rhino CEO Giek testified that Klemisch was removed from the shows at his direction, and that he directed that Klemisch not be scheduled for future work because Giek had learned of Klemisch's violation of Rhino's conflict of interest policy at the parties' RC hearing in early June. Tr. 480:21-25, 483:1-484:1. However, Klemisch was not cancelled from the Mötley Crüe and Imagine Dragons shows until July and was extended other work offers from Rhino after Giek's alleged discovery at the RC hearing. *See generally*, Tr. 146:15-147:18 (exchange beginning with Rhino counsel's assertion

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from stagehands… going as far as to say that the riggers don't even socialize with stagehands… As anyone who has done production work knows, it takes a team effort of all for a production to happen safely and smoothly.").

that "In fact, Rhino offered you six different opportunities [after the RC hearing] to work for them; didn't they?"). Further, no notice of any policy violation or change in his work status (i.e., deactivation or termination) was given to Klemisch in his communications with the Rhino staff.

In November 2015, Klemisch attempted to sign into Rhino's employee computer system. Tr. 81:20-82:12, 85:9-11; GCX 6. Klemisch discovered that he could not and received an error message stating, "[Y]ou are no longer an active employee. Please contact the office for more information." GCX 6. Klemisch called the office and spoke with Amber Peterson in HR. Tr. 85:22-86:1. She informed him that he had been deactivated because he hadn't worked a call within 90 days, and said that she would let the "girls" (i.e., dispatchers) in the office know that he was looking to work upcoming events. Tr. 86:6-17. Peterson never mentioned any alleged violation of a Rhino policy regarding conflicts of interest to Klemisch during their conversation. Tr. 95:24-96:1. Klemisch was never called again to work for Rhino, but was never specifically informed of his deactivation or violation of the conflict of interest policy. Tr. 86:18-20, 99:12-100:19.

III. CHARGING PARTY'S CROSS-EXCEPTIONS

A. Questions For Review

The Charging Party's cross-exceptions present three overarching questions for review regarding the ALJ's findings and conclusions as to the Section 8(a)(3), 8(a)(4) and 8(a)(1) allegations regarding rigger Matthew Klemisch:

1. Did the ALJ properly consider all evidence on record when assessing whether the Respondent proved that it would have taken the same action against Klemisch, absent his protected activities? (Exceptions 1, 3.)

2. Did the ALJ properly consider all evidence on record when assessing whether the Respondent's asserted reasons for terminating Klemisch may be pretext? (Exceptions 2-8.)

3. Should the Section 8(a)(3), 8(a)(4), and 8(a)(1) allegations against Respondent regarding Klemisch have been sustained? (Exception 9.)

B. Authority and Argument In Support Of Cross-Exceptions

Though the Charging Party concurs in the remainder of the ALJ's findings and conclusions, the Charging Party excepts to certain limited findings and conclusions underlying the ALJ's recommended dismissal of the Section 8(a)(3), 8(a)(4), and 8(a)(1) charges regarding the Respondent's deactivation of Matthew Klemisch.

The Board employs the familiar *Wright Line* burden-shifting test to both Section 8(a)(3) and 8(a)(4) allegations. *See e.g., Voith Indus. Services, Inc.*, 363 NLRB No. 109, slip op. at 14 (2016), citing *Wright Line*, 251 NLRB 1083 (1980), *enfd*. 662 F.2d 899 (1st Cir. 1981), *cert denied* 455 U.S. 989 (1982), *approved in, NLRB v. Transport Mgmt. Corp.*, 462 U.S. 393 (1983); *American Gardens Mgmt. Co.*, 338 NLRB 644, 645 (2002). The whole point of the test is that direct evidence of anti-union motive is rare and that employers are reluctant to admit that the true motive for their actions is to retaliate:

> [I]t is seldom that direct evidence will be available that is not also self-serving. In such cases, the self-serving declaration is not conclusive; the trier of fact may infer motive from the total circumstances proved. Otherwise no person accused of unlawful motive who took the stand and testified to lawful motive could be brought to book."

Shattuck Denn Mining Corp. v. NLRB, 366 F.2d 466, 470 (9th Cir. 1966). Thus, the Board views the totality of the circumstances and inferences therefrom when examining (1) the presence of anti-union animus and (2) the reasons asserted by an employer, if any, in support an adverse action, and (3) whether evidence indicates those reasons may be pretextual. *E.C. Waste v. NLRB*, 359 F.3d 36, 42 (2d Cir. 1988). A single factor may have bearing on multiple steps of this analysis. *See, e.g., Alfa Leisure, Inc.*, 251 NLRB 691, 703 (1980) (citing cases) ("If the

stated motive for a discharge is found to be false, it can be inferred that the motive is an unlawful one which the Respondent wishes to conceal, at least where the surrounding facts tend to reinforce that inference."); *NLRB v. Long Island Airport Limousine Service*, 468 F.2d 292, 295 (2d Cir. 1972).

The ALJ erred in his analysis as to both the second and third steps of the *Wright Line* test by focusing on only one possible factor—disparate treatment—and, even so, misapplying the Board's disparate treatment authority. ALJD 28:36-29:12. Specifically, the ALJ found that "the General Counsel has not shown pretext, as there is no evidence that Respondent allowed other employees to remain employed while they operated a competing company," citing to *Memphis Truck & Trailer*, 284 NLRB 900, 910-911 (1987). The ALJ failed to consider other authority, including *In re La Gloria Oil & Gas Co.*, 337 NLRB 1120, 1124 (2002), *aff'd*, 71 Fed. Appx. 441 (5th Cir. 2003) (table), in which the Board has rejected the logic used by the ALJ here, finding instead that, where a specific type of alleged offense has never before occurred, disparate treatment may still be found and discrimination sustained through consideration of the employer's treatment of similar types of conduct. *La Gloria*, 337 NLRB at 1124. In the instant case, the Respondent's admitted widespread tolerance of other employees' violations of the very same sentence of the Respondent's conflict of interest policy and its wholesale failure to *ever* enforce the written policy against an employee before conveniently using it against Klemisch during a union organizing drive smacks of both disparate treatment and pretext.[6] RX 1 at 37; Tr. 59:13-25, 161:11-162:23, 209:5-6; Tr. 357:23-24; Tr. 467:9-19. *See, Gravure Packing, Inc.*, 321 NLRB 1296 (1996) (affirming ALJ assertion that "[A]n employer may not seize upon union

[6] It is noteworthy that the Respondent's justification of its deactivation of Klemisch literally depends upon Klemisch's testimony in an NLRB proceeding. GCX 26 at Tr. 293:13-294:3 (Klemisch testimony).

activity to justify a change in policy so as to bring about the discharge of an employee who would otherwise have been retained.").

The ALJ also failed to consider the numerous other clear indicators of pretext in the record. First, the ALJ overlooked the significant, unexplained gap in time between the Respondent's alleged discovery of Klemisch's business on June 4, 2015 and the date of its termination of Klemisch through deactivation, which its own business records show was not until November 2015. GCX 29 at 3; RX 17 at 82. The Respondent conceded that it continued to schedule Klemisch for new work after the date of Giek's allegedly-damning discovery of Klemisch's business, Precision Rigging. Tr. 483:1-484:1; Tr. 146:15-147:18 (Respondent's counsel claiming Respondent offered Klemisch six additional work opportunities after Klemisch's RC hearing testimony). These factors undermine Giek's testimony in support of Respondent's rationales for terminating Klemisch and create a presumption of unlawful motive. *Montgomery Ward & Co.*, 316 NLRB 1248, 1253 (1995) (citing cases).

Shifting rationales for a decision also present strong evidence of pretext. *Doug Wilson Enterprises*, 334 NLRB 394, 397 (2001); *Mastercraft Casket Co.*, 289 NLRB 1414 (1988). Here, the General Counsel presented unrebutted testimony that, when the Respondent informed Klemisch of his deactivation, its Human Resources official justified the action with different reasons than it now puts forward, telling Klemisch the deactivation was based on Respondent's deactivation policy and Klemisch's failure to work for the Respondent within the preceding 90 days. Tr. 86:9-14.

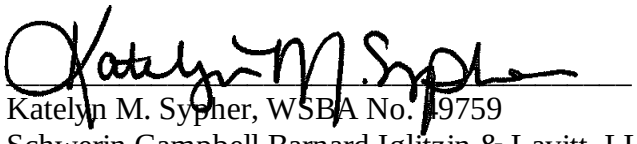
Finally, the Employer's commission of numerous other ULPs contemporaneously with its deactivation of Klemisch—including its unlawful unilateral change to its deactivation policy enacted the very same day as Klemisch's deactivation—presents compelling evidence that this

act, too, was unlawful. *See, e.g., Iowa Beef Processors*, 255 NLRB 1328 (1981) (commission of ULPs against other employees on same day as alleged retaliation against discriminatee supports finding of pretext), *enfd.* 675 F.2d 1004 (8th Cir. 1982); *C.R. General, Inc.*, 323 NLRB 494 (pattern of bad action).

In a case where "[t]he evidence [was] replete with animus" and the record showed that Respondent's CEO "Giek was clearly mad at the testimony that Rhino riggers [including Klemisch] gave at the NLRB pre-election hearing," it is remarkable that the ALJ would overlook these indicators. ALJD 29:6-12; *compare with*, ALJD 25:33; ALJD 26:28-29. The Board should find instead that the great weight of the evidence supports the conclusion that the Respondent's asserted rationale for Klemisch's deactivation was pretext to terminate him for his leadership in the union drive and testimony at an RC hearing, and that the General Counsel more than made its case that the Respondent violated Sections 8(a)(3), 8(a)(4), and 8(a)(1) by deactivating Klemisch.

IV. CONCLUSION

For the foregoing reasons, the Charging Party respectfully requests that the Board grant its limited cross-exceptions to the ALJD.



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DECLARATION OF SERVICE

I, Genipher Owens, hereby declare under penalty of perjury under the laws of the state of Washington that on January 12, 2018, I filed the foregoing Charging Party's Brief In Support of Cross-Exceptions with the National Labor Relations Board and sent a true and correct copy via email to:

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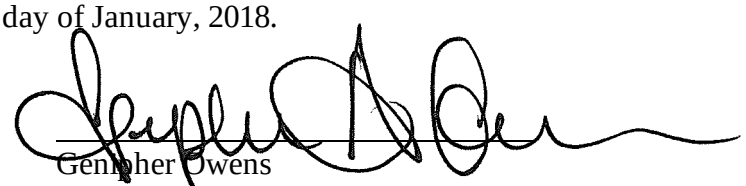
Signed in Seattle, Washington, this 12th day of January, 2018.



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